(26,041)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 574.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

CLARK H. RICE.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

INDEX.

Kalorama & Detweiler (Inc.), Printers, Washington, D. C., July 21, 1917.

a UNITED STATES OF AMERICA:

District Court of the United States, Eastern District of Louisiana, New Orleans Division.

No. 15476.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff in Error,

versus

CLARK H. RICE, Defendant in Error.

Messrs. Denegre, Leovy & Chaffe and Harry McCall, for Louisville & Nashville Railroad Company, Plaintiff in Error.
Messrs. Miller, Miller & Fletchinger, for Clark H. Rice, Defendant in Error.

Writ of error to the District Court of the United States, from the Supreme Court of the United States, returnable within thirty (30) days from the Twenty-ninth (29th) day of June, A. D. 1917, at the City of Washington, District of Columbia.

1 *Petition.*

Filed June 27th, 1916.

To the Honorable the United States District Court for the Eastern District of Louisiana, New Orleans Division:

The petition of Louisville & Nashville Railroad Company, a corporation organized under the laws of the State of Kentucky, and doing business in this City and State, with respect shows:

I.

That petitioner now is and at all times hereinafter mentioned was, a common carrier of freight and passengers for hire engaged in interstate commerce.

II.

That Clark H. Rice, defendant herein, now is, and at all times hereinafter mentioned was, a citizen of the State of Louisiana, and a resident of this City within the jurisdiction of this Honorable Court.

III.

That in the months of February, March and April of 1916 there were shipped from various points in the States of Alabama, Georgia

and Florida to New Orleans, Louisiana, fifty-eight carloads of live stock, all consigned to defendant. Annexed hereto as part hereof is a statement showing (among other things) as to each of the said shipments, the date of shipment (or the date of the waybill) the point of origin, and the initial and number of the car in which the shipment was transported.

IV.

That each of the said fifty-eight shipments was promptly and properly transported to destination and was delivered in good condition to defendant, the consignee thereof, petitioner being in each case the delivering carrier.

V.

That petitioner presented defendant with freight bills covering each of the said fifty-eight shipments and collected from de-
2 fendant the transportation charges due thereon, with the exception of a charge of $2.50 on each shipment which will hereinafter be more fully explained.

VI.

That the said charge of $2.50 just referred to is based on the following provisions in a tariff of petitioner's, effective February 15, 1916; which tariff was duly published and approved by the Interstate Commerce Commission:

"Rule No. 1. All cars in which live stock is received at destination on this line from points within the quarantined area as defined by the United States Department of Agriculture or by the States prescribing quarantine regulations, will be cleaned and disinfected by this company upon arrival, and the charges below specified assessed against the owner of the live stock contained in such cars, and such charges will be in addition to the freight rate applying on the movement of the live stock to the cleaning and disinfecting point. These charges must be collected or guaranteed prior to delivery of the live stock to the consignee;

Single deck	$2.50 per car
Double deck	4.00 per car

Rule No. 2. Where Federal or State quarantine, or other regulations require that a car be cleaned and disinfected before shipment is made, and where, under Rule No. 1 above, such car has not been previously cleaned or disinfected, subsequent to its last use, such cars will be cleaned and disinfected before live stock is loaded and a charge of $2.50 per single deck car and $4.00 per double deck car assessed."

VII.

That each of the said fifty-eight shipments was contained in a single deck car and that each of the said 58 shipments ori-

3 inated at a point or points within the quarantined area as defined by the United States Department of Agriculture or by the States prescribing quarantine regulations.

VIII.

That the said charge of $2.50 was and is due on each of the said fifty-eight shipments, and should have been paid by defendant along with the other transportation charges, which defendant did pay, but that in each case this charge has not been paid either in whole or in part, and is legally due and owing unto petitioner by defendant.

IX.

Petitioner avers amicable demand without avail.

X.

Petitioner avers that the total amount due as above shown is in the sum of $145.00.

XI.

Petitioner shows that this suit is brought under the Interstate Commerce Act of February 4, 1887, (24 Statutes at Large 379) and various acts amendatory thereof.

Wherefore, petitioner prays that Clark H. Rice, defendant, be duly cited to appear and answer this demand and that after due proceedings had there be judgment in favor of petitioner, Louisville & Nashville Railroad Company, and against defendant, Clark H. Rice, in the full sum of $145.00, with interest thereon from date of judicial demand until paid, and for costs and all general and equitable relief.

(Signed) DENEGRE, LEOVY & CHAFFE,
" HARRY McCALL, *Att'ys.*

STATE OF LOUISIANA,
Parish of Orleans:

4 Before me, the undersigned authority, personally came and appeared, Charles Marshall, who being duly sworn deposes and says that he is the chief managing officer of the Louisville and Nashville Railroad Company, petitioner herein; that the President and the Vice-President of said Company, are absent from the State of Louisiana; that he has read the foregoing petition and that all the allegations therein contained are true and correct to the best of his knowledge, information and belief.

(Sig.) CHARLES MARSHALL.

Sworn to and subscribed before me, at New Orleans, Louisiana, this 26 day of June, 1916.

(Sig.) HENRY H. CHAFFE,
Notary Public.

Disinfecting Charges Due on Cattle Shipments by C. H. Rice.

Date waybill.	Waybill number.	Billing point.	Initials.	Number.	Amount.
2-15-16.	A—1091	Montgomery, Ala.	Southern	19436	$2.50
"	A—1902	" "	Wabash	15694	$2.50
2-16-16.	253	Greenville, Ala.	NC&StL.	3738	$2.50
2-19-16.	BB	South, Ala.	L&N.	19734	$2.50
2-19-16.	221	Andalusia, Ala.	L&N.	18461	$2.50
2-23-16.	381	" "	L&N.	19795	$2.50
2-24-16.	23	Sneads, Fla.	L&N.	18400	$2.50
2-24-16.	117	Noma, Fla.	L&N.	19404	$2.50
2-23-16.	SA—55	Cordele, Ga.	Southern	43973	$2.50
"	SA—54	" "	Sou.	43471	$2.50
2-25-16.	8	Black, Ala.	L&N.	19345	$2.50
2-28-16.	SA—69	Cordele, Ga.	Sou.	43188	$2.50
3- 1-16.	6	Owassa, Ala.	L&N.	18165	$2.50
3-11-16.	10	Greenville, Ala.	L&N.	18334	$2.50
3- 1-16.	BB	South, Ala.	L&N.	19569	$2.50
3- 3-16.	A—237	Montgomery, Ala.	SAL.	50042	$2.50
3- 3-16.	A—236	" "	L&N.	18436	$2.50
3- 4-16.	BB	South, Ala.	L&N.	18339	$2.50
3- 3-16.	1	Black, Ala.	L&N.	18143	$2.50
3- 4-16.	72	Andalusia, Ala.	L&N.	18485	$2.50
"	71	" "	L&N.	19230	$2.50
3- 6-16.	117	Greenville, Ala.	L&N.	18140	$2.50
"	ACL—73	Donaldsonville	PL.	647339	$2.50

3– 8–16.	A—568	Montgomery, Ala.	Sou.	44985	$2.50
3–11–16.	27	Opp, Ala.	L&N.	18265	$2.50
3–10–16.	A—821	Montgomery, Ala.	NCSt.L.	3805	$2.50
"	21	Opp, Ala.	St. L&SF.	46354	$2.50
3–13–16.	ACL—79	Donaldsonville	CofGa.	955	$2.50
3–16–16.	298	Greenville, Ala.	L&N.	18403	$2.50
3–15–16.	232	Andalusia, Ala.	L&N.	19352	$2.50
3–18–16.	BB	South, Ala.	L&N.	19712	$2.50
3–22–16.	430	Greenville, Ala.	L&N.	19680	$2.50
3–22–16.	F—158	Mobile, Ala.	L&N.	19375	$2.50
3–22–16.	358	Andalusia, Ala.	L&N.	19929	$2.50
3–23–16.	15	Black, Ala.	L&N.	19834	$2.50
3–25–16.	602	Greenville, Ala.	L&N.	18019	$2.50
3–29–16.	20	Black, Ala.	L&N.	19941	$2.50
4– 3–16.	F—10	Mobile, Ala.	CNOTP.	8458	$2.50
4– 1–16.	BB	South, Ala.	CB&Q.	60717	$2.50
"	BB	" "	L&N.	18436	$2.50
4– 5–16.	93	Andalusia, Ala.	L&N.	19321	$2.50
"	60	Owassa, Ala.	L&N.	18284	$2.50
4– 6–16.	F—35	Mobile, Ala.	CNOTP.	9300	$2.50
4– 8–16.	176	Greenville, Ala.	L&N.	19947	$2.50
4–10–16.	4	Cypress, Fla.	L&N.	18126	$2.50
4–11–16.	11	Black, Ala.	L&N.	19834	$2.50
4–12–16.	257	Greenville, Ala.	L&N.	18487	$2.50
4–15–16.	39	Repton, Ala.	L&N.	18111	$2.50
4–15–16.	127	Owassa, Ala.	L&N.	19687	$2.50
"	17	Black, Ala.	L&N.	18318	$2.50
"	L&N—1	Midway, Ala.	CofGa.	1023	$2.50

CLARK H. RICE.

Date waybill.	Waybill number.	Billing point.	Initials.	Number.	Amount.
4-19-16.	289	Andalusia, Ala.	L&N.	18135	$2.50
4-19-16.	76	Noma, Fla.	AGS.	13290	$2.50
4-17-16.	ACL—459	Cairo, Ga.	CNOTP.	8999	$2.50
4-18-16.	25	Ariton, Ala.	L&N.	18428	$2.50
4-22-16.	BB	South, Ala.	L&N.	19268	$2.50
4-26-16.	76	Ft. Deposit, Ala.	L&N.	18469	$2.50
"	BB	South, Ala.	L&N.	18436	$2.50
					$145.00

6 *Answer.*

Filed February 14th, 1917.

United States District Court, Eastern District of Louisiana.

No. 15467.

LOUISVILLE & NASHVILLE RAILROAD CO.

vs.

CLARK H. RICE.

Now into Court, through his undersigned counsel, comes Clark H. Rice, made defendant in the above numbered and entitled cause, and for answer to said plaintiff's petition, says:

1.

Respondent admits the allegations contained in Paragraphs 1 and 2 of said plaintiff's petition, and requires no proof thereof.

2.

Respondent admits the allegations contained in the third paragraph of said petition, except that he avers the statement attached to plaintiff's petition to be incorrect in that it represents the total number of shipments to have been fifty-eight, when the number was only fifty-four cars.

3.

Respondent admits the allegations contained in paragraphs 4, 5 and 6 of said plaintiff's petition, and also admits the allegations set forth in paragraph 7 thereof, except that the total number of cars consigned to respondent was fifty-four instead of fifty-eight as alleged in the 7th paragraph of said petition.

4.

Respondent specially denies that the charge of $2.50 on each of the fifty-four cars consigned to him is due and owning by him to the plaintiff, and for reason therefor says:

That respondent is now, and at the time the consignments of live stock were made, and for many years prior thereto, was engaged at Arabi Post Office, La., in the business of live stock commission merchant, a fact which was known, or by the exercise of reasonable diligence, should have been known to the plaintiff; that respondent was not the owner, either in whole or in part, of the live stock contained in the several shipments upon which plaintiff now seeks to collect the disinfecting charge of $2.50 per car,

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but that he acted, when receiving said shipments, simply as the factor and commission merchant of the owners of said live stock, who, in each instance, were the consignors; that the relation of the respondent to the shippers of said live stock being that of factor or agent, his duty was to sell the stock upon arrival at the best market prices obtainable, deduct all costs and charges, including his reasonable commission as factor, and remit the balance to his principals, which respondent did.

5.

Respondent now avers that upon arrival at destination of each of said fifty-four cars referred to in said plaintiff's petition he paid all freight charges then demanded of him by said plaintiff; that he was not aware when delivery of these shipments was made, nor when he paid the freight thereon to said plaintiff, that any other charge would or could be made growing out of the same shipments, nor did said plaintiff so advise him, or that any charge or charges other than those which he paid were even contemplated; and respondent avers that it was only after he had sold the cattle and remitted the proceeds to the consignors, his principals, that the plaintiff demanded of him payment of the disinfecting charge of $2.50 per car herein sued for.

6.

Further answering respondent avers that said plaintiff; having led him to believe that the freight charges, which he paid in good faith and upon the basis of which he remitted the proceeds of
8 the cattle when sold to the consignors, were in full settlement of all costs and charges connected with or growing out of said several shipments, is now estopped to demand of him personally the payment of the additional charges herein sued for; and respondent respectfully submits to the Court the question of whether or not he is legally obliged to pay said plaintiff out of his own funds the disinfecting charges herein sued for, when by reason of the negligence and laches of the plaintiff, its agents and employees, he has now lost his recourse against the shippers, who are primarily liable to plaintiff, since respondent only acted as their agent.

Wherefore, respondent prays that plaintiff's suit be hence dismissed at its costs; and for general relief.

(Signed) MILLER, MILLER & FLETCHINGER
Attorneys for Respondent.

Clark H. Rice, being first duly sworn, deposes and says that he has read the above and foregoing answer and knows the contents thereof; that the facts and allegations therein stated are true.

(Signed) C. H. RICE.

Sworn to and subscribed before me at New Orleans, Louisiana, this the 10th day of February, A. D. 1917.

[SEAL.] (Sig.) CHAS. F. FLETCHINGER.
Not. Pub.

9 *Bill of Exception.*

Filed June 29th, 1917.

United States District Court, Eastern District of Louisiana, New Orleans Division.

No. 15476.

LOUISVILLE & NASHVILLE RAILROAD COMPANY

vs.

CLARK H. RICE.

Bill of Exceptions.

Be it remembered, that on June 7, 1917, before the Honorable Rufus E. Foster, Judge of the United States District Court for the Eastern District of Louisiana, the above entitled and numbered cause was called for trial, and a jury impanelled, and the pleadings read before the Court and jury.

Whereupon the plaintiff offered, introduced and filed in evidence a stipulation whereby it was agreed that the following facts should be taken as true:

That plaintiff is, and in February, March and April, 1916, was, a common carrier of freight and passengers for hire, engaged in interstate commerce; that defendant is, and during the months above mentioned was, a citizen of the State of Louisiana, and a resident of the City of New Orleans, within the jurisdiction of this Honorable Court; that in the said months there was shipped from various points in the States of Alabama, Georgia and Florida to New Orleans, Louisiana, fifty-four carloads of live stock, all consigned to defendant; that each of the said shipments was properly and promptly transported to destination and there delivered to defendant, the consignee thereof, by plaintiff, which was in each case the delivering carrier; that plaintiff presented defendant with freight bills covering each of the said shipments and collected from defendant the transportation charges due thereon, with the exception of a charge of

10 $2.50 on each shipment, which charge of $2.50 was based on the following provisions in petitioner's tariff, effective February 13, 1916, which tariff was duly filed, published and approved by the Interstate Commerce Commission:

"Rule No. 1. All cars in which live stock is received at destination on this line from points within the quarantined area as defined by the United States Department of Agriculture or by the States prescribing quarantine regulations, will be cleaned and disinfected by this company upon arrival, and the charges below specified assessed against the owner of the live stock contained in such cars, and such charges will be in addition to the freight rate applying to the movement of the live stock to the cleaning and disinfecting point. These charges

must be collected or guaranteed prior to delivery of the live stock to the consignee:

Single deck	$2.50 per car
Double deck	4.00 per car

Rule No. 2. Where Federal or State quarantine, or other regulations require that a car be cleaned and disinfected before shipment is made, and where, under Rule No. 1 above, such car has not been previously cleaned or disinfected, subsequent to its last use, such cars will be cleaned and disinfected before live stock is loaded and a charge of $2.50 per single deck car and $4.00 per double deck car assessed."

That each of the said shipments was contained in a single deck car, and each of said shipments originated at a point or points within the quarantine area as defined by the United States Department of Agriculture or by the States prescribing quarantine regulations; that the said charge of $2.50 on each of the said shipments has not been paid in whole or in part by defendant or anyone else, and that plaintiff has made demand upon defendant, but no demand upon the consignors; that the total amount so claimed is the sum of $135.00, and that the present action is brought under the Interstate Commerce Act of February 4, 1887 (24 Stat. at Large, 379) and various acts amendatory thereof; and that the failure on the part of plaintiff to demand the said charges was due to the fact that plaintiff overlooked the provisions of the tariff herein sued on, and that demand was made as soon as the error was discovered by plaintiff;

That thereupon plaintiff rested.

Whereupon, the defendant took the stand and testified, in substance, that his name was Clark H. Rice, that he lives at
11 2326 Robert Street, New Orleans, and is engaged in the live stock commission business at the Crescent City Stock Yards, St. Bernard Parish, which is the slaughtering establishment for New Orleans and its immediate vicinity; that he has been engaged in the said business at the same location for twenty-six years.

Whereupon counsel for defendant asked defendant the following question:

"You have been made defendant in this suit for a charge of two and a half on each of a certain number of cars of live stock. Now, when you received those shipments of live stock, please state in what capacity you received them?"

to which counsel for plaintiff made the following objection:

"Objection.

Mr. McCall: That question is objected to as the evidence sought to be adduced is incompetent, irrelevant and immaterial. It has been shown by the agreed statement of facts which has been offered in evidence that this defendant was the consignee of those shipments, that he paid the freight on them, and we contend that, having paid

these freight charges, he is the person that should have paid any other freight charges, irrespective of what his actual relation may have been towards the shipments, or towards the shippers of the shipments, and that, therefore, the evidence is immaterial."

Whereupon, before ruling on the objection, the Court interrogated the witness, who stated, in substance, in answer to the Court's questions, that at the time the said shipments were received he was not aware of the fact that there were quarantine charges on cattle that came from quarantined territory; that this charge went into effect in February, but he knew nothing of it until about May 22nd, when they billed us with those charges; that the February, March and April bills all came together; that he knows now that the charges were on file at that time, but did not know it at the time the cattle were shipped; that if he had known it at that time and the railroad had made demand upon him for those charges, he would have protected himself and have paid the charges and charged the shippers, as he did previously; that he does not dispute that the Interstate Commerce Commission would require him to pay these charges, regardless of whether they were on the freight bills or not.

12 Whereupon the Court ruled as follows:

"The Court: It looks to me, Mr. McCall, that the best I can do with the case is to dismiss it on the question of jurisdiction, and then you can take it up to the Supreme Court. I will make my ruling that way. I will sustain your objection, Mr. McCall, but it is quite evident to me that under the recent ruling in the case of Illinois Central Railroad vs. Zemurray, decided by the Court of Appeals of the Fifth Circuit, that this is not a case under the interstate commerce laws, and in amount not exceeding three thousand dollars, this court is without jurisdiction. Therefore the court, ex proprio motu, will dismiss it."

To which ruling of the Court plaintiff promptly excepted, and still excepts, which exception was then and there allowed by the Court. That in accordance with said ruling, the Court on the same day entered judgment dismissing plaintiff's suit for lack of jurisdiction, which judgment was signed on June 13, 1917.

And now, in furtherance of justice, and that right may be done the plaintiff, the Louisville and Nashville Railroad Company, tenders and presents the foregoing bill of exceptions, to which it annexes as part thereof, all of the said evidence, agreements and documents adduced or introduced in the trial of said case in the Court aforesaid.

And defendant prays that the same may be settled and allowed, and signed and sealed by the Court, and that it may be made a part of the record in this case, which is now done by the Court accordingly, on this the 29 day of June, 1917, nunc pro tunc as of June 7, 1917.

The trial Judge makes a part of this bill of exceptions all of the evidence, agreements and documentary evidence adduced or introduced in the trial of the case, marked exhibits A. & B., respectively, and which the signature of Henry J. Carter, Clerk of the aforesaid

Court thereon, for identification herewith, and does hereby certify that the testimony, agreements and documentary evidence so annexed to this bill and so identified by said marks and signatures as part thereof, is all of the evidence introduced at the trial of said case.

And the Clerk of Court is ordered to file same, this bill of
13 exceptions, and plaintiff is allowed three days within which to lodge same with the said Clerk.

(Signed) RUFUS E. FOSTER, *Judge;*
(Signed) DENERGE, LEOVY & CHAFFE,
" HARRY McCALL,
Attorneys for Louisville & Nashville Railroad Company, Plaintiff.

Compared, Examined & approved, June 29/17.
(Signed) CHAS. F. FLETCHINGER,
Att'y for Defendant.

14 *Testimony.*

Filed June 29th, 1917.

United States District Court, Eastern District of Louisiana.

No. —.

LOUISVILLE & NASHVILLE RAILROAD COMPANY

vs.

CLARK H. RICE.

Proceedings had in the Above-numbered and Entitled Cause in Open Court before the Honorable Rufus E. Foster, Judge of the United States District Court for the Eastern District of Louisiana, on June 7, 1917.

Appearances:

Mr. Harry McCall, of counsel for plaintiff.
Mr. Charles F. Fletchinger, of counsel for defendant.

15 *Offer.*

Mr. McCall: I offer in evidence agreed stipulation as to certain facts.
Plaintiff closes.

Defendant's Testimony.

CLARK H. RICE, the defendant, sworn and examined witness in his own behalf, testified as follows:

Direct examination.

By Mr. Fletchinger:

Q. What is your name?
A. Clark H. Rice.
Q. Where do you reside?
A. 2326 Robert Street, New Orleans.
Q. What business are you engaged in at this time?
A. Live stock commission business.
Q. Where are you engaged in that business?
A. Crescent City Stock Yards, St. Bernard Parish.
Q. Crescent City Stock Yards is a slaughtering establishment for New Orleans and its immediate vicinity, is it not?
A. Yes, sir.
Q. How long have you been engaged in the business as commission merchant?
A. Twenty-six years.
Q. In New Orleans or elsewhere?
A. At this same location, Crescent City Stock Yards.
Q. You have been made defendant in this suit for a charge of two and a half on each of a certain number of cars of live stock. Now, when you received those shipments of live stock, please state in what capacity you received them?

16 *Objection.*

Mr. McCall: That question is objected to as the evidence sought to be adduced is incompetent, irrelevant and immaterial. It has been shown by the agreed statement of facts which has been offered in evidence that this defendant was the consignee of those shipments, that he paid the freight on them, and we contend that, having paid those freight charges, he is the person that should have paid any other freight charges, irrespective of what his actual relation may have been towards the shipments, or towards the shippers of the shipments, and that, therefore, the evidence is immaterial.

By the Court:

Q. Were you aware of the fact that there were quarantine charges on cattle that came from quarantined territory?
A. At that time I was not. It was the period from February to May. We knew nothing of it. This charge went into effect in February, but we knew nothing of it until some time, I think about the 22nd of May, they billed us with those charges. The February, March and April bills all came together.
Q. You know now those charges were on file at that time?

A. I know now they are; yes sir.
Q. And you didn't know it at the time the cattle were shipped?
A. No sir.
Q. If you had known it at the time, and the railroad had made demand upon you for those charges, you would have paid it?
Q. I would have protected myself.
Q. You would have paid it?
A. I would have charged the shippers, as we did previously.
Q. You don't dispute that the Interstate Commerce Commission would require you to pay these charges?
A. No sir.
17 Q. Regardless of whether they were on the freight bill or not?
A. No, we are advised of it now.

The Court: It looks to me, Mr. McCall, that the best I can do with this case is to dismiss it on the question of jurisdiction, and then you can take it up to the Supreme Court. I will make my ruling that way. I will sustain your objection, Mr. McCall, but it is quite evident to me that under the recent ruling in the case of Illinois Central Railroad vs. Zemurray, decided by the Court of Appeals of the Fifth Circuit, that this is not a case under the interstate commerce laws, and in amount not exceeding three thousand dollars, this court is without jurisdiction. Therefore the Court, ex proprio motu, will dismiss it.

Mr. McCall: Will your Honor allow me to take an exception to your Honor's ruling?

The Court: You can except to that, and that will preserve your rights to take it direct to the Supreme Court, and I will certify that is the only question at issue.

18 *Statement of Facts.*

Filed June 7th, 1917.

United States District Court, Eastern District of Louisiana, New Orleans Division.

No. 15467.

LOUISVILLE & NASHVILLE RAILROAD COMPANY

vs.

CLARK H. RICE.

Stipulation as to Facts.

It is hereby agreed by and between the parties to this cause, herein represented by the undersigned counsel, that the following facts shall be taken as true on the *the* trial of this cause.

I.

That petitioner, Louisville & Nashville Railroad Company, now is, and at all times hereinafter mentioned was, a common carrier of freight and passengers for hire engaged in interstate commerce.

II.

That Clark H. Rice, defendant herein, now is, and at all times hereinafter mentioned was, a citizen of the state of Louisiana, and a resident of this city, within the jurisdiction of this Honorable Court.

III.

That in the months of February, March and April of 1916, there were shipped from various points in the state of Alabama, Georgia and Florida, to New Orleans, Louisiana, fifty-four carloads of live stock all consigned to defendant. Annexed hereto, as part hereof, is a statement showing, among other things as to each of said shipments, date of shipment (or date of way bill) point of origin, initial and number of the car in which each shipment was transported.

IV.

That each of the said fifty-four shipments was properly and
19 promptly transported to destination, and was delivered to defendant, Clark H. Rice, consignee thereof, by petitioner, Louisville & Nashville Railroad Company, being in each case the delivering carrier.

V.

That petitioner presented defendant with freight bills covering each of the fifty-four shipments and collected from defendant the transportation charges due thereon, with the exception of a charge of two dollars and fifty cents ($2.50) on each shipment, which will hereinafter be more fully explained.

VI.

That the said charge of two dollars and fifty cents ($2.50) just referred to is based on the following provisions in a tariff of petitioner's effective February 13, 1916, which tariff was duly filed published and approved by the Interstate Commerce Commission.

"Rule No. 1. All cars in which live stock is received at destination on this line from points within the quarantined area is defined by the United States Department of Agriculture or by the States prescribing quarantine regulations, will be cleaned and disinfected by this company upon arrival and the charges below specified assessed against the owner of the live stock contained in such cars, and such

charges will be in addition to the freight rate applying to the movement of the live stock to the cleaning and disinfecting point. These charges must be collected or guaranteed prior to delivery of the live stock to the consignee:

Single deck	$2.50 per car.
Double deck	4.00 per car.

Rule No. 2. Where Federal or State quarantine, or other regulations require that a car be cleaned and disinfected before shipment is made, and where, under Rule No. 1, above, such car has not been previously cleaned and disinfected subsequent to its last use, such cars will be cleaned and disinfected before live stock is loaded and a charge of $2.50 per single deck car and $4.00 per double deck car assessed."

VII.

That each of said fifty-four shipments was contained in a single deck car and that each of said fifty-four shipments originated at a point or points within the quarantined area as defined by the United States Department of Agriculture or by the States prescribing quarantine regulations.

VIII.

That the said charge of two dollars and fifty cents ($2.50) on each of said fifty-four shipments has not been paid either in whole or in part by defendant or by anyone else, and that petitioner has made amicable demand upon defendant, but that no demand has been made upon the consignors; that the total amount claimed by petitioner of defendant, because of failure to collect the aforesaid charges, is one hundred and thirty-five dollars ($135.00), and that the present action is brought under the Interstate Commerce Act of February 4, 1887, (34 Statutes at Large, 379) and various acts amendatory thereof.

IX.

That the failure on the part of the plaintiff to demand the said charges was due to the fact that the plaintiff overlooked the provisions of the tariff herein sued on, and that demand was made as soon as the error was discovered by plaintiff.

(Signed) DENEGRE, LEOVY & CHAFFE,
HARRY McCALL,
Att'ys for Plaintiff.

(Signed) MILLER, MILLER & FLETCHINGER,
Att'ys for Defendant.

Date waybill.	Waybill number.	Billing point.	Initials.	Number.	Amount.
2-15-16.	A—1902	Montgomery, Ala.	Wabash	15695	$2.50
2-16-16.	253	Greenville, Ala.	NC&St.L.	3738	$2.50
2-19-16.	BB	South, Ala.	L&N.	19734	$2.50
2-19-16.	221	Andalusia, Ala.	L&N.	18461	$2.50
2-23-16.	381	Andalusia, Ala.	L&N.	19695	$2.50
2-24-16.	23	Sneads, Fla.	L&N.	18400	$2.50
2-24-16.	117	Noma, Fla.	L&N.	19404	$2.50
2-23-16.	SA—55	Cordele, Ga.	Southern	43973	$2.50
2-23-16.	SA—54	Cordele, Ga.	Southern	43471	$2.50
2-25-16.	8	Black, Ala.	L&N.	19395	$2.50
2-28-16.	SA—60	Cordele, Ga.	Southern	43188	$2.50
3- 1-16.	6	Owassa, Ala.	L&N.	18165	$2.50
3- 1-16.	10	Greenville, Ala.	L&N.	18334	$2.50
3- 1-16.	BB	South, Ala.	L&N.	19569	$2.50
3- 3-16.	A—237	Montgomery, Ala.	SAL.	50042	$2.50
3- 3-16.	A—236	Montgomery, Ala.	L&N.	18436	$2.50
3- 4-16.	BB	South, Ala.	L&N.	18339	$2.50
3- 3-16.	1	Black, Ala.	L&N.	18043	$2.50
3- 4-16.	72	Andalusia, Ala.	L&N.	13485	$2.50
3- 4-16.	71	Andalusia, Ala.	L&N.	19230	$2.50
3- 6-16.	117	Greenville, Ala.	L&N.	18140	$2.50
3- 6-16.	ACL—73	Donaldsonville	PL.	647339	$2.50
3- 8-16.	A—568	Montgomery, Ala.	Southern	44985	$2.50
3-11-16.	27	Opp, Ala.	L&N.	18265	$2.50
3-12-16.	ACL—79	Donaldsonville	CofGa.	955	$2.50
3-16-16.	298	Greenville, Ala.	L&N.	18403	$2.50
4-15-16.	232	Andalusia, Ala.	L&N.	19352	$2.50

Date waybill.	Waybill number.	Billing point.	Initials.	Number.	Amount.
4-18-16.	BB	South, Ala.	L&N.	19712	$2.50
3-22-16.	430	Greenville, Ala.	L&N.	19680	$2.50
3-22-16.	F—158	Mobile, Ala.	L&N.	19375	$2.50
3-22-16.	358	Andalusia, Ala.	L&N.	19929	$2.50
3-23-16.	15	Black, Ala.	L&N.	19834	$2.50
3-25-16.	502	Greenville, Ala.	L&N.	18019	$2.50
3-29-16.	20	Black, Ala.	L&N.	19941	$2.50
4- 3-16.	F—10	Mobile, Ala.	CNOTP.	8458	$2.50
4- 1-16.	BB	South, Ala.	CB&Q.	60717	$2.50
4- 1-16.	BB	South, Ala.	L&N.	18436	$2.50
4- 5-16.	93	Andalusia, Ala.	L&N.	19321	$2.50
4- 5-16.	60	Owassa, Ala.	L&N.	18284	$2.50
4- 6-16.	F—35	Mobile, Ala.	CNOTP	9300	$2.50
4- 8-16.	176	Greenville, Ala.	L&N.	19947	$2.50
4-10-16.	4	Cypress, Fla.	L&N.	18126	$2.50
4-11-16.	11	Black, Ala.	L&N.	19834	$2.50
4-12-16.	267	Greensville, Ala.	L&N.	18487	$2.50
4-15-16.	39	Ropton, Ala.	L&N.	18111	$2.50
4-15-16.	127	Owassa, Ala.	L&N.	19687	$2.50
4-15-16.	15	Black, Ala.	L&N.	18318	$2.50
4-15-16.	L&N—1	Midway, Ala.	CofGa.	1022	$2.50
4-19-16.	289	Andalusia, Ala.	L&N.	18135	$2.50
4-19-16.	76	Noma, Fla.	AGS.	13290	$2.50
4-17-16.	ACL—459	Cairo, Ga.	CNOTP.	8999	$2.50
4-16-16.	25	Ironton, Ala.	L&N.	18428	$2.50
4-22-16.	BB	South, Ala.	L&N.	19268	$2.50
4-26-16.	BB	South, Ala.	L&N.	18436	$2.50
					$135.00

23 *Judgment.*

Extract from Judgment Book.

May Term, 1917.

NEW ORLEANS, Thursday, June 7th, 1917.

Court met pursuant to adjournment.
Present: Hon. Rufus E. Foster, Judge.

No. 15476.

LOUISVILLE & NASHVILLE RAILROAD COMPANY

vs.

CLARK H. RICE.

This cause was this day called for trial;
Present: Harry McCall, of counsel for plaintiff;
" Charles F. Fletchinger, of counsel for defendant;
Whereupon, the following named jurors were called and sworn to well and truly try the issue joined herein, to-wit:
1. Noll R. Melancon, 2. John J. Brennan, 3. Lesseps Story, 4. W. A. Brand, 5. P. M. Miller, 6. F. E. Thensted, 7. Guy Michel, 8. John Marks, 9. James B. Eaton, 10. James Holtry, 11. Franz Hindermann, Jr., 12. Victor M. Gossett; and the trial was proceeded with.
Thereupon, after hearing the pleadings, evidence and testimony in part, and it appearing to the Court that this Court is without jurisdiction of this cause, for the reasons assigned;
It is ordered, adjudged and decreed by the Court, of its own motion, that the jury be discharged and that this suit be dismissed at plaintiff's cost for want of jurisdiction, without prejudice.
Judgment rendered June 7, 1917.
Judgment signed June 13, 1917.

(Signed) RUFUS E. FOSTER, *Judge.*

24 *Petition for Writ of Error and Order.*

Filed June 29, 1917.

United States District Court, Eastern District of Louisiana, New Orleans Division.

No. 15476.

LOUISVILLE & NASHVILLE RAILROAD COMPANY

VS.

CLARK H. RICE.

To the Honorable Rufus E. Foster, Judge of the United States District Court, aforesaid:

Now comes Louisville & Nashville Railroad Company, plaintiff herein, through its attorneys, and respectfully shows that on the 7th day of June, 1917, the Court ex proprio motu entered a judgment, signed on June 13, 1917, in favor of defendant, Clark H. Rice, and against plaintiff herein, dismissing plaintiff's suit for want of jurisdiction;

That in rendering said judgment the Honorable the United States District Court for the Eastern District of Louisiana com-itted errors to the prejudice of plaintiff herein, all of which will more fully appear from the assignment of errors filed with, and made part of, this petition.

Wherefore, premises considered, your petitioner prays that a writ of error may issue in its behalf to the Supreme Court of the United States for the correction of the errors complained of and herewith assigned, and that a transcript of the record, evidence, testimony, proceedings and papers in this cause, duly authenticated may be sent to the Supreme Court of the United States; your petitioner further prays that an order be made fixing the amount of security to be given by plaintiff in error conditioned as the law directs, and upon giving such bond as may be required that all further proceedings may be suspended until the determination of said writ of error by the Supreme Court of the United States.

(Signed) DENEGRE, LEOVY & CHAFFE,
" HARRY McCALL,
Attorneys for Petitioner.

25 *Order.*

The foregoing petition for writ of Error is allowed, upon the petitioner furnishing bond in the sum of One Hundred Dollars, conditioned as the law requires.

New Orleans, La., June 29th, 1917.

(Signed) RUFUS E. FOSTER; *Judge.*

26 *Assignment of Errors.*

Filed June 29th, 1917.

United States District Court, Eastern District of Louisiana, New Orleans Division.

No. 15476.

LOUISVILLE & NASHVILLE RAILROAD COMPANY

vs.

CLARK H. RICE.

Assignment of Errors.

The plaintiff in this action, in connection with its petition for writ of error, makes the following assignment of errors, which it avers exist:

1st. The Court erred in dismissing plaintiff's suit;

2d. The Court erred in deciding that no Federal question was involved;

3d. The Court erred in deciding that it was without jurisdiction or power to entertain the suit;

4th. The Court erred in not concluding and deciding that under and by virtue of Paragraph 8 of Section 24 of the Judicial Code of the United States (Act of March 3, 1911, Chap. 231, 36 Statutes at Large 1087-1167) and the Interstate Commerce Act (Act of February 4th 1887, 24 Statutes at Large 379) and acts amendatory thereof, the Court had jurisdiction to try and determine this cause.

Wherefore, the plaintiff prays that said judgment be reversed.

(Signed) GEORGE DENEGRE,
" VICTOR LEOVY,
" HENRY H. CHAFFE,
" HARRY McCALL,
Attorneys for Plaintiff.

27 *Certificate of Judge.*

Filed June 29th, 1917.

United States District Court, Eastern District of Louisiana, New Orleans Division.

No. 15476.

LOUISVILLE & NASHVILLE RAILROAD COMPANY

vs.

CLARK H. RICE.

I hereby certify that in my opinion this case is not one arising under a law of the United States regulating commerce as no construction of any such act is necessary to its decision; that it does not appear from the record or otherwise that the court has jurisdiction on other grounds; that only the question of jurisdiction was considered by me in dismissing the case.

For these reasons, at the request of plaintiff, the question of jurisdiction is hereby certified to the Supreme Court of the United States for decision.

New Orleans, La., June 29th, 1917.

(Signed) RUFUS E. FOSTER, *Judge.*

28 *Bond for Writ of Error.*

Filed June 30th, 1917.

Know all Men by these Presents, That we, Louisville & Nashville Railroad Company, as principal, and Felix J. Puig, as surety, are held and firmly bound unto Clark H. Rice in the full and just sum of One hundred no/100 Dollars ($100.00) to be paid to the said Clark H. Rice certain attorney, executors, administrators or assigns: to which payment, well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 30th day of June in the year of our Lord, one thousand nine hundred and seventeen.

Whereas, lately at a Session of the United States District Court, holding sessions in and for the Eastern District of Louisiana, in a suit depending in said Court, between Louisville & Nashville Railroad Company, plaintiff, and Clark H. Rice, defendant, No. 15476 of the Docket of said Court, a judgment was rendered against the said Louisville & Nashville Railroad Company, dismissing its suit and the said Louisville & Nashville Railroad Company having obtained a writ of Error and filed a copy thereof in the Clerk's Office of the

said Court to reverse the said Judgment in the aforesaid suit, and a citation directed to the said Clark H. Rice citing and admonishing him to be and appear before the Supreme Court of the United States to be holden at Washington, D. C. within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said Louisville & Nashville Railroad Company shall prosecute its said Writ of Error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) LOUISVILLE & NASHVILLE RAILROAD COMPANY, [SEAL.]
By DENEGRE, LEOVY & CHAFFE,
HARRY McCALL, [SEAL.]
Its Attorneys.
" FELIX J. PUIG. [SEAL.]

Sealed and delivered in presence of—
(Signed) J. HATRET.
" FRED SCHAEFER.

Approved by—
(Signed) RUFUS E. FOSTER, *Judge.*

Approved:
(Signed) MILLER, MILLER & FLETCHINGER,
Att'ys for Defendant.

29 UNITED STATES OF AMERICA,
Eastern District of Louisiana, ss:

Personally Appeared, Felix J. Puig who being duly sworn, deposes and says that he is the surety on the within bond, that he resides in the City of New Orleans and is worth the full sum of One hundred 00/100 Dollars, over and above all his debts and liabilities and property exempt from execution.
(Signed) FELIX J. PUIG.

Subscribed and Sworn before me this 30 day of June 1917.
(Signed) HENRY H. CHAFFE, [SEAL.]
Notary Public.

30 *Præcipe for Transcript.*

Filed June 29th, 1917.

On Letterhead of Denegre, Leovy & Chaffe.

NEW ORLEANS, June 29, 1917.

United States District Court, Eastern District of Louisiana, New Orleans Division.

No. 15476.

LOUISVILLE & NASHVILLE RAILROAD CO.

VS.

CLARK H. RICE.

H. J. Carter, Esq., Clerk United States District Court, City.

DEAR SIR: In making up the transcript in the above case, the undersigned have agreed and do hereby agree that the transcript will include only the following:

1. Petition and exhibit thereto annexed filed on behalf of plaintiff.
2. Answer filed on behalf of defendant.
3. Agreed stipulation as to facts.
4. Testimony of C. H. Rice, including rulings of Court.
5. Judgment.

Please be governed accordingly.

Yours very truly,

(Signed) DENEGRE, LEOVY & CHAFFE,
" HARRY McCALL,
Attorneys for L. & N. R. Co., Plaintiff.
(Signed) MILLER, MILLER & FLETCHINGER,
Att'ys for C. H. Rice, Defendant.

31 UNITED STATES OF AMERICA:

District Court of the United States, Eastern District of Louisiana, New Orleans Division.

Clerk's Office.

I, Henry J. Carter, Clerk of the District Court of the United States for the Eastern District of Louisiana, do hereby certify that the foregoing 30 pages contain and form a full, complete, true and perfect transcript of the record, assignment of errors and proceed-

ings in the case of the Louisville & Nashville Railroad Company vs. Clark H. Rice, No. 15476 of the Docket of the District Court of the United States for the Eastern District of Louisiana, New Orleans Division (made in accordance with the præcipe for Transcript, copied herein).

Witness my hand and the seal of said Court at the City of New Orleans, Louisiana, this 6th day of July, A. D. 1917.

[Seal U. S. District Court for the Eastern Dist. of La., N. O. Div.]

H. J. CARTER, *Clerk.*

32 *Issued for Denegre, Leovy & Chaffe, Att'ys.*

THE UNITED STATES OF AMERICA:

District Court of the United States, Eastern District of Louisiana.

The President of the United States to Clark H. Rice, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the City of Washington, D. C., within 30 days from date hereof, pursuant to a Writ of Error filed in the Clerk's Office of the District Court of the United States for the Eastern District of Louisiana, wherein Louisville & Nashville Railroad Company, is Plaintiff in Error, and Clark H. Rice, is Defendant in Error, in the cause wherein Louisville & Nashville Railroad Company, is Plaintiff, and Clark H. Rice, is Defendant, No. 15476 of the Docket of the United States District Court for the Eastern District of Louisiana, New Orleans Division, to show cause, if any there be, why the judgment rendered against the said Louisville & Nashville Railroad Company as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Rufus E. Foster, Judge of the United States District Court, at New Orleans, La., this 29th day of June in the year of our Lord one thousand nine hundred and seventeen.

(Signed) RUFUS E. FOSTER, *Judge.*

[Seal U. S. District Court for the Eastern Dist. of La., N. O. Div.]

Clerk's Office:
A true copy.

H. J. CARTER, *Clerk.*

New Orleans, La., June 29th, 1917.

4—574

33 [Endorsed:] Received by U. S. Marshal, New Orleans, La., July 2nd, 1917, and on the 2nd day of July 1917 I served the Original of which this is a certified copy on Clark H. Rice by handing same to him in person. In the City of New Orleans, La. Car fare 10¢. Frank H. Miller, U. S. Marshal, by Walter J. Griffin, Deputy.

[Endorsed:] Return. E. W. P. United States District Court, Eastern District of Louisiana. No. 15476. Louisville & Nashville Railroad Company vs. Clark H. Rice. Citation of Appeal. Marshal's Return. No. —. U. S. District Court, Eastern District of Louisiana, New Orleans Division. Filed Jul- 5, 1917. Hy. J. Loisel, Dep. Clerk.

34 UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judge of the District Court of the United States for the Eastern District of Louisiana, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Louisville & Nashville Railroad Company, Plaintiff, and Clark H. Rice, Defendant, No. 15476, of the Docket of said Court, a manifest error hath happened, to the great damage of the said Louisville & Nashville Railroad Company, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all the things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C. within 30 days from the date hereof, in the said Supreme Court of the United States, to be then and there held; that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what, of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the said Supreme Court of the United States, this 29th day of June in the year of our Lord one thousand nine hundred and seventeen.

[Seal U. S. District Court for the Eastern Dist. of La., N. O. Div.]

H. J. CARTER,
Clerk of the United States District Court
for the Eastern District of Louisiana.

Allowed by
RUFUS E. FOSTER, *Judge.*

35 [Endorsed:] United States District Court. No. 15476. Louisville & Nashville Railroad Company versus Clark H. Rice. Writ of Error. No. —. U. S. District Court, Eastern District of Louisiana, New Orleans Division. Filed Jun- 29 1917. H. J. Carter, Clerk.

Endorsed on cover: File No. 26,041. E. Louisiana D. C. U. S. Term No. 574. Louisville & Nashville Railroad Company, plaintiff in error, vs. Clark H. Rice. Filed July 19th, 1917. File No. 26,041.

SUBJECT INDEX.

LIST OF CASES.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

No. 574

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Plaintiff in Error,

versus

CLARK H. RICE,
Defendant in Error.

In Error to the District Court of the United States for the Eastern District of Louisiana.

Brief on Behalf of Plaintiff in Error.

SYLLABUS.

A suit for collection of charges due according to a tariff duly published and filed under authority of the Interstate Commerce Act is a "suit or proceeding arising under a law regulating commerce;" and the District

Courts of the United States have original jurisdiction thereof under paragraph 8 of Section 24 of the Judicial Code, irrespective of the amount involved, diversity of citizenship, or the character of defense.

I.

STATEMENT OF CASE.

This suit was brought in the United States District Court for the Eastern District of Louisiana, by the Louisville & Nashville Railroad Company against Clark H. Rice, on June 27, 1916, the amount claimed being one hundred forty-five dollars ($145.00). The petition (Tr., p. 1) stated in substance that plaintiff, as the last connecting carrier, delivered at New Orleans, Louisiana, to defendant, as consignee, various interstate shipments of live stock; that the freight charges then demanded of defendant, were paid by him, but that under the tariffs duly filed and approved by the Interstate Commerce Commission, and published and in effect at the time the various shipments were made, there was an additional charge of two and 50/100 dollars ($2.50) due on each shipment, which charge had been demanded of defendant, but remained unpaid, despite such demand. This charge of $2.50 was based on the following provisions in the tariff of the plaintiff in error effective February 15, 1916, which was duly published and filed with the Interstate Commerce Commission, to-wit:

> "Rule No. 1. All cars in which live stock is received at destination on this line from points within

the quarantined area as defined by the United States Department of Agriculture or by the States prescribing quarantine regulations, will be cleaned and disinfected by this company upon arrival, and the charges below specified assessed against the owner of the live stock contained in such cars, and such charges will be in addition to the freight rate applying to the movement of the live stock to the cleaning and disinfecting point. These charges must be collected or guaranteed prior to delivery of the live stock to the consignee:

Single deck .....$2.50 per car.
Double deck ..... 4.00 per car

"Rule No. 2. Where Federal or State quarantine or other regulations require that a car be cleaned and disinfected before shipment is made, and where, under Rule 1 above, such car has not been previously cleaned and disinfected, subsequent to its last use, such cars will be cleaned and disinfected before live stock is loaded and a charge of $2.50 per single deck car and $4.00 per double deck car assessed."

Each of the fifty-four shipments to defendant in error was contained in a single deck car, and each of them originated at a point or points within the quarantined area as defined by the United States Department of Agriculture or by the States prescribing quarantine regulations (see stipulations as to facts, Tr., p. 2). Defendant thereafter filed his answer (Tr., p. 7), his defense being that he was not the owner of the said shipments, and had settled with the owners, with regard to whom he acted merely as a commission merchant.

The case went to trial on June 7, 1917, a jury being impaneled. Plaintiff offered in evidence an agreed statement of facts (Tr., p. 14), and rested. Defendant then took the

stand on his own behalf, and shortly after his direct examination had been commenced, the Court, *ex proprio motu*, dismissed the suit for want of jurisdiction (Tr., p. 19).

From the judgment dismissing plaintiff's suit for want of jurisdiction, this writ of error was prosecuted, the sole question being (as shown by the foregoing outline of the case and the certificate of the trial Judge, which will be found at page 22 of the printed transcript), as to the jurisdiction of the Court.

II.

SPECIFICATION OF ERRORS.

(1) The errors assigned are:

1st. That the Court erred in dismissing plaintiff's suit.

2nd. That the Court erred in deciding that no Federal question was involved.

3rd. That the Court erred in deciding that it was without power or jurisdiction to try the suit; and

4th. That the Court erred in not concluding and deciding that under and by virtue of Paragraph 8 of Section 24 of the Judicial Code, and the Interstate Commerce Act and acts amendatory thereof, the Court had jurisdiction to try and determine this cause.

These various assignments are an expression of the same idea in different words, that is, that jurisdiction existed, and we shall treat them accordingly.

III.

ARGUMENT.

The suit was an action by an interstate carrier of freight, to recover a balance of charges due under tariffs filed, approved and published in accordance with the Interstate Commerce Act, and we contend that a Federal question was presented and that the case was within the jurisdiction of the District Court, irrespective of the amount involved.

As we understand the theory of the trial Judge, in refusing to take jurisdiction of the case, he considered that since the only issue under the pleadings was the validity of a defense which in no wise questioned the construction of the tariff on which the suit was based or the rate applicable, but simply denied the right of the carrier to collect from this particular defendant, no controversy existed as to the construction of any Federal law.

This view, as appears from the statement of the Court, which will be found at page 14 of the transcript, was founded on the ruling of the Circuit Court of Appeals for the Fifth Circuit in the case of *Yazoo & Mississippi Valley Railroad Co. v. Zemurray* (erroneously referred to as "*Illinois Central Railroad v. Zemurray*"), 238 *Fed.*, 789. In that case, a suit substantially the same as the present one was brought, and there, as here, the defendant did not dispute the correctness of the charge claimed, but contended that for various reasons, the action would not lie against him. The lower Court sustained these defenses, and the Circuit Court of Appeals, to which the railroad took the case, adopted the opinion of the trial Judge with regard

thereto, and then proceeded to go further and say, at page 791:

> "On the facts stated, we doubt the jurisdiction of the Court on the ground that the amount involved is less than $3,000. It appears to be a case of ordinary collection of a freight bill wherein the carrier through error and neglect failed to collect the stipulated freight from the consignee, and now sues the consignor.
>
> "We find no question in this case involving the Elkins law, or any other interstate commerce laws."

Our contention is that this expression was a mere *dictum* and was erroneous. If the view therein expressed were correct, no carrier could safely bring an undercharge suit in a Federal Court, no matter what the amount involved, except when jurisdiction existed because of diversity of citizenship; for unless the defendant should question the correctness of the amount claimed, there would be no Federal question presented. In other words, all suits of this character would have to be brought in the State Courts, so that the practical enforcement of the Federal laws in this regard would have to be entrusted to the Courts of the different States. Such result would be inconsistent with the purposes of the Interstate Commerce Act (Act of February 4, 1887, 24 *Stat. L.*, 382, *c.* 104, *s.* 9), and the circumstances leading up to it.

The general scope of that Act was stated in the case of *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 *U. S.*, 426, *at pages* 437-8:

> "The act made it the duty of carriers subject to its provisions to charge only just and reasonable rates.

To that end the duty was imposed of establishing and publishing schedules of such rates. It forbade all unjust preferences and discriminations, made it unlawful to depart from the rates in the established schedules until the same were changed as authorized by the act, and such departure was made an offense punishable by fine or imprisonment, or both, and the prohibitions of the act and the punishments which it imposed were directed not only against carriers but against shippers, or any person who, directly or indirectly, by any machinations or device, in any manner whatsoever, accomplished the result of producing the wrongful discriminations or preferences which the act forbade. It was made the duty of carriers subject to the act to file with the Interstate Commerce Commission created by that act copies of established schedules, and power was conferred upon that body to provide as to the form of the schedules, and penalties were imposed for not establishing and filing the required schedules. The Commission was endowed with plenary administrative power to supervise the conduct of carriers, to investigate their affairs, their accounts and their methods of dealing, and generally to enforce the provisions of the act. To that end it was made the duty of the District Attorneys of the United States, under the direction of the Attorney General to prosecute proceedings commenced by the Commission to enforce compliance with the act. The act specially provided that whenever any common carrier subject to its provisions 'shall do, cause to be done, or permit to be done any act, matter or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the

provisions of this act. * * *' Power was conferred upon the Commission to hear complaints concerning violations of the act, to investigate the same and, if the complaints were well founded, to direct not only the making of reparation to the injured persons, but to order the carrier to desist from such violation in the future. In the event of the failure of a carrier to obey the order of the Commission, that body, or the party in whose favor an award of reparation was made, was empowered to compel compliance by invoking the authority of the Courts of the United States in the manner pointed out in the statute, *prima facie* effect in such Courts being given to the findings of fact made by the Commission."

The *Abilene case* grew out of a suit in the State Courts by a shipper to recover a portion of certain freight charges on various interstate shipments, paid in accordance with the tariffs duly published and filed with the Interstate Commerce Commission, the suit being based on the theory that the rates so established were unreasonable. The Court pointed out that if charges approved by the Commission could be attacked in the State Courts for unreasonableness, the result would be that the maintenance of any tariff in a given State would depend on the view of the Courts of that State as to its reasonableness. The same tariff might be attacked in different States, with a different result in each State. Since the underlying purpose of the Commerce Act was to bring about uniformity of charges, and that purpose would be defeated by complainants' construction of the Act, that construction was held to be untenable. A rate can be attacked only before the Commission, the branch of the Government which passes on the rate in the first instance;

and it is only from the decision of the Commission that an appeal may be taken to the United States Courts.

The basic purpose of the Interstate Commerce Act is to enforce the actual payment and collection of uniform rates on all shipments. When a carrier brings a suit to collect a freight charge, the question that arises is whether that charge is due. The incorrect maintenance by a State Court of any defense whatever, would as surely defeat the purpose of the Interstate Commerce Act as would a holding by a State Court that a rate is unreasonble. The relations between the carrier on the one hand, and the shipper or consignee on the other, and the rights and obligations which arise from the relationship, are of just as vital importance to a proper and uniform enforcement of the Interstate Commerce Act as the question of what rate should be paid; for if the Courts of Louisiana should hold a shipper liable to a carrier on a certain cause of action, whereas, under identical facts, the State Courts of Mississippi should hold another shipper not liable, the very inequality and discrimination which it was the purpose of Congress to do away with when it took charge of the field of Interstate Commerce, would necessarily exist.

We submit that the instant a carrier renders a service with regard to an interstate shipment, the Federal law requires that carrier to collect whatever compensation its tariffs may fix for the character of service rendered, and that carrier has a cause of action arising out of a Federal law.

Section 24 of the Judicial Code provides, in so far as relevant to the present issue:

> "The District Courts shall have original jurisdiction as follows:

"First. Of all suits of a civil nature, at common law, or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different States, or (c) is between citizens of a State and foreign States, citizens, or subjects. * * * Provided, however, that the foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section. (36 *Stat. L.*, 1091.) * * *

"Eighth. Of all suits and proceedings arising under any law regulating commerce, except those suits and proceedings exclusive jurisdiction of which has been conferred upon the Commerce Court (36 *Stat. L.*, 1092)."

The only possible escape from the jurisdiction of the Federal Courts of a suit of this character is on the theory that the suit is not one "arising under any law regulating commerce."

It is manifest that but for the Interstate Commerce Act a suit of this sort would not lie, for under the common law any rate agreed on would be binding between the parties and in the absence of any agreement, the carrier would have to show what is a reasonable rate. But, say our opponents, while it may be true that the suit was brought by virtue of the Federal Act, the answer filed shows that no Federal question is at issue. We say, in the first place, that the collection *vel non* of the lawful freight charges on an interstate shipment is in itself a Federal question, and in the next

place, we maintain that for jurisdictional purposes the averments of the petition determine the nature of the suit. As was well said by Chief Justice Marshall, in *Osborne v. Bank*, 9 *Wheat.*, 738, *at pages* 823-4:

> "When a bank sues, the first question which presents itself, and which lies at the foundation of the cause, is has this legal entity a right to sue? Has it a right to come, not into this Court particularly, but into any Court. This depends on a law of the United States. The next question is, has this being a right to make this particular contract? If this question be decided in the negative, the cause is determined against the plaintiff; and this question, too, depends entirely on a law of the United States. These are important questions, and they exist in every possible case. The right to sue, if decided once, is decided forever; but the power of Congress was exercised antecedently to the first decision on that right, and if it was constitutional then, it cannot cease to be so, because the particular question is decided. It may be revived at the will of the party and most probably would be renewed, were the tribunal to be changed. But the question respecting the right to make a particular contract, or to acquire a particular property, or to sue on account of a particular injury, belongs to every particular case, and may be renewed in every case. The question forms an original ingredient in every cause. Whether it be in fact relied on or not, in the defense, it is still a part of the cause, and may be relied on. The right of the plaintiff to sue, cannot depend on the defense which the defendant may choose to set up. His right to sue is anterior to that defense, and must depend on the State of things when the action is brought. The questions which the case involve, then, must determine its character, whether those questions be made in the cause or not."

To the same effect was the more recent case of *Tennessee v. Davis*, 100 *U. S.*, 257, 264:

> "A case consists of the right of one party as well as the other, and may truly be said to arise under the Constitution or a law or a treaty of the United States whenever its correct decision depends upon the construction of either. Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defense of the party, in whole or in part, by whom they are asserted. *Story on the Constitution*, Sec. 1647; 6 *Wheat.*, 379. It was said in *Osborne v. The Bank of the United States* (9 *Wheat* 738) 'When a question to which the judicial power of the Union is extended by the Constitution forms an ingredient in the original cause, it is in the power of Congress to give the circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.' And a case arises under the laws of the United States when it arises out of the implication of the law."

On principle, therefore, jurisdiction of the Federal Courts is clear, but since the question is of considerable importance to the railroads of the country, it may be useful to examine the question from other angles.

It was accepted jurisprudence (until recent legislation) that the mere fact that a corporation existed by virtue of a Federal charter, was sufficient to give any litigation to which that corporation may be a party a Federal character. For instance, some years ago, an employe of the Texas & Pacific Railway Company was accidentally killed. A suit was brought in the State Courts, for his death, against the

railroad and the engineer and fireman of the train. The defendant removed the case to the United States Court, and plaintiff moved to remand to the State Courts, on the theory that while the Texas & Pacific Railway Company might be a Federal corporation, the other two defendants were citizens of Texas. The Supreme Court, to which the case was taken, held that jurisdiction of the Federal Court was based, not on diversity of citizenship, but on the presence of a Federal question, because of the Federal charter of the Texas & Pacific Railway Company; that as to it the right to remove the case to the Federal Courts manifestly existed; that since the action was brought jointly against the Texas & Pacific Railway Company, and the other two defendants, the Federal nature of the suit as to one defendant permeated the entire case, and therfore made it removable.

Matter of Dunn, 212 *U. S.*, 374.

By analogy, since in the present case the Federal statute forms an ingredient of plaintiff's cause of action, the entire suit is permeated with a Federal question, and jurisdiction therefore exists.

The identical question here under consideration had been previously presented to the District Court from whose decision this writ is now prosecuted, in the case of the *Illinois Central Railroad Company v. Segari*, 205 *Fed.*, 998, and that Court squarely held that the Federal Courts have jurisdiction of suits of this character. The same view was taken by the District Court for the Eastern District of New York, in *Wells Fargo v. Cuneo*, 241 *Fed.*, 726, and Wells *Fargo v. Cuneo*, 241 *Fed.*, 727.

In the matter of *Atchison, T. & S. F Ry. Co. v. Kinkade*, 203 *Fed.*, 165, the District Court of Kansas, in a very well

reasoned opinion, maintained the jurisdiction, stating in conclusion that:

> "As the duty of the plaintiff to charge and collect the regularly established and published rate in this action from defendant, and the corresponding obligation of the defendant to pay the same regardless of any understanding, agreement, or other act of the parties, arises out of the provisions of the Interstate Commerce Act and not from any contract between the parties, this Court has jurisdiction, and the motion to dismiss must be overruled and denied."

In all of the four cases just referred to, the defendants expressly excepted to the jurisdiction of the Federal Court. There has been at least one undercharge case brought to this Court (*Louisville & Nashville Railroad Co. v. Maxwell*, 237 *U. S.*, 94), but in that case nothing was said on the question of jurisdiction, the case being taken to this Court by writ of error to the Supreme Court of the State of Tennessee. Clearly, however, there could have been no jurisdiction of the Supreme Court of the United States, to hear the case, unless a Federal question was involved. That such a question was assumed to be present is manifest from the following language, at page 97 of the opinion:

> "Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless, it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases,

but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination."

That the theory underlying the entire Interstate Commerce Act is that the maintenance of the tariffs established thereunder presents a Federal question is clear from the reasoning of the Court in the cases of *Gulf, Colorado & Sante Fe Railway Co. v. Hefley*, 158 *U. S.*, 98, and *Texas & Pacific Railway Co. v. Mugg*, 202 *U. S.*, 242. In the former case an action was brought in the State Courts of Texas, to recover a penalty established by a Texas statute for failure promptly to deliver an interstate shipment. This Court held that since the passage of the Interstate Commerce Act, there was no room for State legislation with regard to interstate shipments, and that therefore the penalty claimed could not be collected.

In the *Mugg case*, a shipper brought an action in the State Courts, to recover the difference between the tariff rate which was actually collected from him and the rate set forth in the bill of lading, such action being based on a State statute. This Court held that the tariff rates had to be protected, and of course reversed the judgment of the State Court.

A very recent decision which throws considerable light on the present controversy is *Georgia, Florida and Alabama Ry. Co. v. Blish Co.*, 241 *U. S.*, 190. In that case an action for damages to an interstate shipment was brought in the State Courts. From a decision adverse to the carrier a writ was taken to this Court, on the theory that the State Courts did not give proper effect to the provision of the bill of lading with regard to making claim and in holding a

delivering carrier liable. The Supreme Court expressly stated that the construction of an interstate bill of lading is a Federal question. In other words, since Congress has enacted the Interstate Commerce Act, it has covered by legislation the entire field, and has excluded therefrom State legislation or control. It follows that the solution of controversy between a carrier and a shipper with regard to an interstate shipment, depends on rights and liabilities prescribed by the Interstate Commerce Law, and therefore presents a Federal question and is a suit or proceeding arising under a law regulating commerce.

The extent of the Federal jurisdiction in such matters is well illustrated by the case of *Illinois Central Railroad Co. v. Messina*, 240 *U. S.*, 395. The facts of that case were that a trespasser stealing a ride was hurt in a wreck. For the injuries so received, he brought suit in the State Courts. One of the defenses presented by the carrier was that the plaintiff was at the time violating the Interstate Commerce Act, not having paid any fare. The State Courts refused to consider this defense, and the Supreme Court of the State affirmed a judgment against the railroad company. From such judgment a writ of error was prosecuted to this Court, which reversed the judgment of the State Court because of its failure to consider the defense that the plaintiff was violating the Interstate Commerce Act, and the fact that had the defense been considered, a different result might have been reached. Nothing was said on the question of jurisdiction, but it is clear that the only possible theory on which jurisdiction could have existed was that a Federal question was presented by virtue of the defense based on the Interstate Commerce Act.

In the case of *Cleveland, C. & St. L. Ry. Co. v. Hirsch*, 204 *Fed.*, 849, the carrier sued to set aside a lease, on the theory that the real consideration for the lease was a preference violative of the Interstate Commerce Act. The defendant, lessee, denied the jurisdiction of the Federal Court, on the ground that no Federal question was presented. The Circuit Court of Appeals for the Sixth Circuit took the view that the controversy was clearly based on the Interstate Commerce Act and that jurisdiction therefore existed.

In a very well reasoned opinion of the Circuit Court of Appeals for the Fifth Circuit (the very Court rendering the Zemurray decision) in *Alabama, G. S. R. R. Co. v. American Cotton Oil Co.*, 229 *Fed.*, 11, the Court upheld the right of removal to the Federal District Court, in an action brought in the State Court by a shipper to recover damages to an interstate shipment, on the theory that the liability of a carrier for the handling of an interstate shipment is based on the provisions of the Interstate Commerce Act. As the Court said about cases of this character, at page 21:

> "It is difficult to conceive a case brought for a violation of the Carmack Amendment of the Interstate Commerce law which does not depend upon the operation and effect of that law."

A similar conclusion was reached by the District Court of Kansas, in the case of *Smith v. Atchison, Topeca & Santa Fe. R. R. Co.*, 210 *Fed.*, 988.

The following language of Judge Taft, in the case of *Toledo, A. A. & M. M. Ry. Co. v. Pennsylvania Co., et al.*, 54 *Fed.*, 730, was quoted with approval in *Macon Grocery Co. v. Atlantic Coast Line*, 215 *U. S.*, 501, 507-8:

> "It is immaterial what rights the complainant would have had before the passage of the Interstate Commerce Law. It is sufficient that Congress, in the constitutional exercise of power, has given the positive sanction of Federal law to the rights secured in the statute, and any case involving the enforcement of those rights is a case arising under the laws of the United States."

In *McGoon v. Northern P. R. R. Co.*, 204 *Fed.*, 998, an action was brought in the State Court to recover alleged damages to an interstate shipment of live stock. Defendant removed to the Federal Court, and plaintiff moved to remand. The reasoning of Judge Amidon, at page 1000, in denying this motion, is, we urge, worthy of most serious consideration:

> "Do the suits 'arise under' Section 20 of the Interstate Commerce Act? These words are found in the judicial article (Article 3) of the Federal Constitution, were used in the original Judiciary Act of 1789 (Act Sept. 24, 1789, c. 20, 1 Stat., 73), and have been a part of all subsequent statutes defining the jurisdiction of Federal Courts. Few subjects, however, are involved in greater perplexity than their meaning. Many criteria have been laid down for determining when a suit arises under Federal law. They can be classified, but they cannot be harmonized. In the language of Chief Justice Marshall, a case 'may truly be said to arise under the Constitution or a law of the United States, when ever its correct decision depends on the construction of either.' (*Cohens v. Virginia*, 6 *Wheat.*, 379, 5 *L. Ed.*, 257); or when 'the title or right set up by the party, may be defeated by one construction of the Constitution or law of the United States, and sustained by

the opposite construction.' (*Osborne v. Bank of United States*, 9 *Wheat.*, 822, 6 *L. Ed.*, 204). And yet in the latter case it was held that a suit by or against a Federal corporation was one arising under Federal law—a doctrine which has since been adhered to by the Supreme Court. *Pacific R. R. Removal Cases*, 115 *U. S.*, 1, 5 *Sup. Ct.*, 1113, 29 *L. Ed.*, 319. It would, however, be difficult to conceive a case less likely to involve a construction of Federal law than the ordinary suit by or against a Federal corporation. A suit by or against a receiver of a national bank (*Bartley v. Hayden* (*C. C.*) 74 *Fed.*, 913), or a receiver appointed by a Federal Court (*Central Trust Co. v. East Tenn. V. & G. Ry. Co.*, (*C. C.*) 69 *Fed.*, 353; *State of Washington v. Northern Pacific R. Co.* (*C. C.*) 75 *Fed.*, 333), arises under the Constitution and laws of the United States, although as a rule such suits in no way involve a controversy as to the meaning of the Federal Constitution or law. Suits to protect the rights of patentees under Federal law are held to arise under the patent law, although many, possibly most, of them turn wholly upon questions of fact.

"Counsel calls attention to the following language in *Defiance Water Co. v. Defiance*, 191 *U. S.*, 184, 190, 24 *Sup. Ct.*, 63, 66 (48 *L. Ed.*, 140):

" 'When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution or laws. And it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the

United States, before jurisdiction can be maintained on this ground.'

"Similar language has been used in other decisions. An examination of these cases, however, will generally show that the right asserted in the complaint was not a right created by Federal law. On the contrary, such law was only indirectly and remotely concerned, and the right immediately in litigation was created by State law. Such were *Gold Washing & Water Co. v. Keyes*, 96 *U. S.*, 199, 24 *L. Ed.*, 656, and *Shoshone Mining Co. v. Rutter*, 177 U. *S.*, 505, 20 *Sup. Ct.*, 726, 44 *L. E.*, 864. When the complaint discloses such a case, it becomes affirmatively clear that the suit does not arise out of Federal law, and not only does not, but cannot, properly, present a controversy as to the meaning of such law.

"It cannot be that the jurisdiction of a suit originally brought in the District Court, or removed thereto, on the ground that it arises under the Federal Constitution or law, must depend upon whether in the actual trial of the case a controversy will arise as to the effect or construction of the Federal Constitution or law. That must be so, because it never can be determined from the complaint alone, upon which such jurisdiction is entirely dependent (*Tennessee v. Union & Planters' Bank, 152 U. S., 454, 14 Sup. Ct., 654, 38 L. Ed., 511*), and that the case will actually involve a controversy as to the meaning of the Federal Constitution or law. What controversy the case will present necessarily depends upon the issue raised by the answer. Though plaintiff bases his right upon Federal law, the defendant may concede the law and the interpretation thereof asserted by the plaintiff, and raise only issues of fact."

The series of cases decided by the Supreme Court in 1913, of which the first was *Southern Express Co. v. Croninger*,

226 *U. S.*, 491, show the care with which the Federal Courts guard against any attempt to restrict Federal control over matters of this character. See *Kansas City Southern Ry. Co. v. Carl*, 227 *U. S.*, 639; *Missouri, Kansas & Texas R. R. Co. v. Harriman*, 227 *U. S.*, 657.

In the very recent case (not yet reported) of *Southern Pacific Co. v. Stewart*, decided on December 17, 1917, in discussing the removal of a damage suit against a carrier, this Court said:

> "In this case the plaintiff sought to recover more than $3,000, and in view of the allegations of the complaint, it may be conceded that the action being for loss or injury to cattle shipped in interstate commerce for transportation by a common carrier this suit is one which arose under a law of the United States, and might have been removed to a Federal Court on that ground."

So far as we have been able to discover, there is only one case, besides the *Zemurray case*, in any way militating against our contention. That case, *Orr v. Baltimore & Ohio R. Co.*, 242 *F.*, 608, decided by the District Court for the Western District of New York, was an action for damages commenced against a carrier in the State Courts, and removed to the Federal Court. On motion to remand, it was held that since the jurisdiction of the Federal Court was claimed by virtue of the alleged existence of a Federal question and since the defendant was domiciled in Maryland and suit could therefore not have been originally brought in the Federal Court of New York, there was no right of removal. The Court then added:

> "Furthermore, the decisions make it very doubtful whether the suit, assuming that it does depend

upon Section 20 of the Interstate Commerce Act, does arise out of a law of the United States within the meaning of Section 24, subd. 8, of the Judicial Code and in case of doubt it has always been the practice of this circuit to remand."

This case and the Zemurray case were both criticised by Judge A. N. Hand, in *Wells Fargo Co. v. Cuneo*, 241 *Fed.*, 726.

In conclusion we contend that the Interstate Commerce Act made it not only the right, but also the duty, of plaintiff below to institute this suit; that the action therefore squarely arises out of a law regulating commerce. That defendant may have seen fit to base its resistance to payment of the claim on personal grounds cannot alter or affect the nature of the claim. If the Federal Courts have not original jurisdiction over all suits for charges claimed due on interstate shipments, then the State Courts may place forty-eight different constructions on the relative rights and liabilities of shippers and carriers, and there can be no relief from such an intolerable situation; for, of course, the judgment of a State Court cannot be corrected by writ of error if no Federal question be present, as is contended.

We submit that the decree of the District Court should be reversed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

No. 574

LOUISVILLE & NASHVILLE RAILROAD COMPANY,

Plaintiff in Error,

versus

CLARK H. RICE,

Defendant in Error.

In Error to the District Court of the United States for the Eastern District of Louisiana.

Brief on Behalf of Defendant in Error.

SYLLABUS.

An ordinary action by a carrier to collect the balance of a freight bill after it had failed through error to collect the full amount from the consignee upon delivery "in-

volves no action under the Elkins Act (Act Feb. 19, 1903; *C.* 708, 32 *Stat.*, 847; *Comp. Stats.*, 1913, *Secs.* 8597-8599), or any other interstate commerce laws, and, therefore, does not give the Federal Court jurisdiction where the amount involved is less than three thousand dollars.

I.

STATEMENT OF CASE.

The only question brought up here for review under the writ of error is the correctness of the ruling made by the Court below, dismissing this suit for want of jurisdiction.

The suit involves the collection of an ordinary freight bill, amounting to one hundred and thirty-five dollars, based upon an alleged failure to collect the balance of the charges claimed to be due.

Plaintiff in error averred, in substance, that it was an interstate carrier, and, as such, had transported certain cars of live stock from adjoining States into the State of Louisiana, and there delivered them to the consignee, Rice, who, while having paid all transportation charges demanded of him at the time, had omitted to pay certain other charges as for disinfecting the cars, and prayed for judgment against the defendant in error for the disinfecting charges, which were not paid when delivery was made to him as the consignee.

The defendant in error admitted that the shipments were of an interstate character, that prior payment had been

made by him of all lawful charges, except those sued for, and these he admitted had been prescribed under and pursuant to the proper Federal authority and were lawfully in effect at the time the shipments were made. In other words, there is absolutely no denial of the validity of the rates or charges themselves, nor of their application to the shipments in question, a fact known to the plaintiff in error or its counsel before the suit was filed. Defendant in error specially denies liability, and this for the reason that, at the time he received the shipments, he acted simply as the agent or factor of the owners of the live stock, who, in each instance, were the consignors, a fact then known to the carrier or, by the exercise of reasonable diligence, should have been; that, before delivery had been made, he paid all costs and charges demanded of him by the carrier, and was not then aware that any other charges were lawfully due and collectible; that it was only after he sold the cattle and had, in good faith, remitted the proceeds to his principals—the shippers—that the carrier called upon him for payment of the disinfecting charges, now the subject of this litigation. And he submitted to the Court the question of whether or not he could be legally made to pay the additional charges, when, by reason of the gross failure and inexcusable neglect on the part of the carrier, its agents and employees, he had lost all recourse against those primarily liable.

In the course of the trial, a jury having been impanelled, the Court, *ex proprio motu*, dismissed the suit for want of jurisdiction. The present writ of error was prosecuted to this Court as a result of that ruling.

II.

ARGUMENT.

In dismissing the suit, after a jury had been impanelled, and upon his own initiative, the Court below indicated (Tr., p. 11) that he felt constrained to dismiss the suit as a result of the opinion and decree in the recent case of *Yazoo & Mississippi Valley R. R. Co. v. Zemurray*, 238 *Fed.*, *p.* 789, a decision by the Circuit Court of Appeals of the Fifth Circuit.

The opinion in the *Zemurray case*, being comparatively short, is here reproduced in full for convenience of reference, and for the purpose of showing precisely what the issues were before the Court, and the decision thereon.

> Pardee, Circuit Judge. "The facts of this case and the reasons for judgment in the District Court are fully stated in the opinion of the Court overruling the motion for a new trial, as follows:
>
> " 'In this case the plaintiff sues for $36 freight on a shipment from New Orleans, La., to Natchez, Miss. The jury was waived, and the case tried in open Court on the pleadings, admissions of counsel, and some evidence. The facts are not in dispute, and are as follows: Zemurray sold a carload of ripe bananas to A. Pegano at Natchez, Miss., terms f. o. b., New Orleans, La., but before shipping them required the purchaser to deposit the price in a bank in Natchez, subject to his draft. The car was shipped consigned to Pegano, and the railroad issued its bill of lading in the usual form. The proper amount of freight was $45, but the railroad made delivery to

Pegano and by error collected only $9. Thereafter demand was made on Pegano for the balance. He did not pay. The attorneys for the railroad wrote him several letters, but did not sue him. The railroad made demand on Zemurray. He advised it of his method of making the sale, declined to pay the difference in freight, and subsequently advised the railroad of other shipments made to Pegano that might have been reached by process. It is not shown that Pegano was insolvent, and he was doing business at the time this suit was entered. There was judgment in favor of the defendant, and plaintiff has applied for a new trial.

" 'The plaintiff contends that a carrier may waive its lien and deliver the freight and hold either the consignee or consignor, and this regardless of the usual clauses in bills of lading as to delivery to the consignees, he paying freight, and regardless of the ownership of the goods. Many cases have been cited, and the rule contended for seems to be supported by the weight of authority.

" 'However, in deciding the case against the plaintiff, I did so because I was satisfied the railroad could have collected from the consignee, if it had sued him; that, having elected to collect the freight from the consignee, who was the owner of the fruit and bound to pay the freight ultimately, it would be inequitable to permit the carrier to change its base and proceed against the consignor, who was only technically liable. Conceding that Zemurray was primarily liable to the railroad because of having made the contract, the mode of shipment was *prima facie* notice to the carrier that the shipper had parted with ownership on delivery of the goods to it and that the shipment was for account of the consignee. Before suit, the railroad was advised of the actual facts, and property of the consignee subject to exe-

cution pointed out. Considering all this, I see no reason to change my opinion.

" 'The motion for a new trial will be denied.'

"We might rest our decision upon the facts and reasons as given by Judge Foster, but we deem it proper to go further.

"On the facts stated, we doubt the jurisdiction of the Court on the ground that the amount involved is less than $3,000. It appears to be a case of ordinary collection of a freight bill wherein the carrier, through error and neglect, failed to collect the stipulated freight from the consignee, and now sues the consignor.

"We find no question in this case involving the Elkins law, or any other interstate commerce laws.

"Since the shipment was regular in all other respects and the only thing complained of is the failure of parties responsible to pay the freight, we are also of opinion that even on the case made the plaintiff in error delayed too long to bring suit, and his claim is prescribed under Louisiana law by three years as pleaded in the case.

"Waiving, however, the question of jurisdiction, we find no reversible error in the proceedings of the District Court.

"Judgment affirmed, with costs."

The essential facts in the *Zemurray case* are not dissimilar to those in the case at bar. There, as here, the defendant below did not dispute the validity of the rate, nor deny its application to the facts set up in the petition. The defense was special, and proceeded upon the theory that under the common law of carriers, unaffected by special legislation, the defendant was not liable. The plaintiff railroad in the *Zemurray case* failed to collect the published

tariff rate, not because any party to the original shipment had refused at the time to pay the legal rate, but because of its own colossal neglect and failure in the premises.

Having omitted to collect the lawful rate as a result of its own gross laches from the person who, in law and good conscience should have discharged that obligation in its favor, the carrier conceived the idea of resorting to the Act to Regulate Commerce as the means, and the District Court of the United States as the place, for collecting what, under the common law, it knew or had reasonable cause to believe, was not legally due and demandable of and from Zemurray.

The plaintiff in error assumes that simply because the tariff in effect at the time the shipments in this case moved was sanctioned by a Federal Statute, the Act to Regulate Commerce, necessarily any right springing out of that relation must be vindicated in a Federal tribunal. There is here no dispute as to the legality of the rate, nor its application to the shipments made. In the language of the Court in the *Zemurray case*, this is "an ordinary action by a carrier to collect an unpaid freight bill."

The suit is defended upon the theory that the liability of the consignee, who is not the owner, is fully discharged upon payment by him of the amount demanded by the carrier upon surrender of its lien. (*Hutchinson on Carriers, Third Edition, Sec.* 807; *Central Railroad v. MacCartney*, 68 *N. J. Law, p.* 165), an illuminating opinion by Mr. Justice Pitney.

If this defense is good at common law, as we believe it is, there appears to be nothing in the Act to Regulate

Commerce that militates against its application to the facts in this case, since the validity of the charges under the published tariff rate is and has at all times been admitted. Indeed, Section 22 of the act in question expressly provides:

> "Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of the Act are in addition to such remedies."

The mere circumstance that it may become necessary in the progress of the litigation to give a construction to the Constitution or Federal Statutes, is not sufficient of itself to support jurisdiction. Speaking of the right of removal into a Federal Court of a suit pending in a State Court, Chief Justice Waite, as the organ of the Court, in *Gold-Washing & Water Co. v. Keyes*, 96 *U. S.*, *p.* 203, said:

> "A cause cannot be removed from a State Court simply because, in the progress of the litigation, it may become necessary to give a construction to the Constitution or laws of the United States. The decision of the case must depend upon that construction. The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved."

In dismissing a writ of error for want of jurisdiction, in *Cook County v. Calumet & Chicago Canal & Dock Co.*, Chief Justice Fuller, 138 *U. S.*, 635, said:

> "The validity of a statute is not drawn in question every time rights claimed under such statute are con-

troverted, nor is the validity of an authority, every time an act done by such authority is disputed."

See, also, 178 *U. S.*, 239, *Western Union Tel. Co. v. Ann Arbor R. R. Co.*; 175 *U. S.*, 571, *Blackburn v. Portland Gold Mining Co.*; 202 *U. S.*, 313, *Divine v. Los Angeles.*

The familiar decisions of this Court, cited by opposing counsel holding, in effect, that the one and only lawful and correct freight rate was that set forth in the schedule and tariff, filed in the office of the Interstate Commerce Commission, and duly published and posted, are not disputed.

It suffices to say that they have no application here, since no one disputes what the lawful rate is. The question for the purposes of this case is simply, that whoever owes the disinfecting charges sued for, it is not the defendant in error; and, establishing the identity of that person, "involves no controversy in regard to the operation and effect of the Constitution or laws of the United States," within the meaning of the Statutes conferring jurisdiction upon Federal Courts.

Wherefore, it is submitted the judgment below should be affirmed.

Respectfully submitted,

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Attorneys for Defendant in Error.

LOUISVILLE & NASHVILLE RAILROAD COMPANY v. RICE.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 574. Submitted April 1, 1918.—Decided May 20, 1918.

Judicial Code, § 24, gives jurisdiction to the District Courts "of all suits and proceedings arising under any law regulating commerce." *Held*, that a suit so arises where the carrier sues the consignee of an interstate shipment of live stock to collect a charge for disinfecting the cars, alleged to be due under tariffs approved and published as required by the Interstate Commerce Act, and where the consignee, admitting the interstate character of the shipment and propriety of the charges under the act, defends on the ground that the carrier by its acts is estopped from holding him responsible.

Reversed.

THE case is stated in the opinion.

Mr. George Denegre, Mr. Henry L. Stone, Mr. Victor Leovy, Mr. Henry H. Chaffe and *Mr. Harry McCall* for plaintiff in error.

Mr. T. M. Miller, Mr. John D. Miller and *Mr. Charles F. Fletchinger* for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Did the District Court rightly decide that it had no jurisdiction, is the only question presented.

Plaintiff in error sued to recover one hundred and forty-five dollars claimed to be due under tariffs approved and published as required by Interstate Commerce Act, for disinfecting fifty-eight cars containing live stock shipped

from points outside the State and delivered to defendant, the consignee, at New Orleans, Louisiana. It alleged presentation of bills covering each shipment and payment by defendant of all charges except those for disinfecting—two dollars and fifty cents per car.

Answering, defendant admitted the shipments were interstate; that he paid all lawful charges, except those sued for; and that these had been properly prescribed under and pursuant to the Interstate Commerce Act. But he denied liability for these reasons: As the carrier well knew, or should have known, he had long been engaged in the business of factor or commission merchant; in due course while acting as representative for their owners and consignors he received the live stock, sold them immediately upon arrival, deducted expenses, etc., and remitted balance of proceeds to his principals; when the cars arrived he paid all charges actually demanded; he was not then advised and remained unaware that any others were contemplated until such balance had been remitted. Having led him to believe the amount asked and paid before he remitted entire net proceeds constituted full settlement, the carrier is now estopped from demanding more of him.

The trial court upon its own initiative dismissed the action for want of jurisdiction.

Section 24 of the Judicial Code provides that regardless of amount involved District Courts shall have original jurisdiction "of all suits and proceedings arising under any law regulating commerce." The Interstate Commerce Act requires carrier to collect and consignee to pay all lawful charges duly prescribed by the tariff in respect of every shipment. Their duty and obligation grow out of and depend upon that act.

In support of the trial court it is said: There is no jurisdiction unless the suit in part at least arises out of a controversy in regard to operation or effect of the act of Congress. Here there is no dispute as to legality of rate

or its application to the shipments; and consignee's liability was fully discharged upon payment by him of amount demanded at time of delivery and surrender of the carrier's lien.

"Cases arising under the laws of the United States are such as grow out of the legislation of Congress." *Tennessee* v. *Davis*, 100 U. S. 257, 264. "Whether a party claims a right under the Constitution or laws of the United States is to be ascertained by the legal construction of its own allegations." *Central R. R. Co. of New Jersey* v. *Mills*, 113 U. S. 249, 257. "If the plaintiff really makes a substantial claim under an act of Congress there is jurisdiction whether the claim ultimately be held good or bad." *The Fair* v. *Kohler Die Co.*, 228 U. S. 22, 25. A suit arises under an act of Congress when "it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends." *Shulthis* v. *McDougal*, 225 U. S. 561, 569. As to interstate shipments "there can be no question that, since the decision in the *Cranginger Case* [226 U. S. 491], the parties are held to the responsibilities imposed by the federal law, to the exclusion of all other rules of obligation." *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Starbird*, 243 U. S. 592, 595; *Louisville & Nashville R. R. Co.* v. *Maxwell*, 237 U. S. 94, 97.

The railroad company set up a claim based upon provisions of a tariff duly filed, published and approved as required by Interstate Commerce Act; result of the action necessarily depended upon construction and effect of that act.

We think the District Court had jurisdiction. Its judgment is accordingly reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed.